No. 153.
Brf. of Ford for Appt.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 153.

THE ARIVACA LAND AND CATTLE COMPANY,
APPELLANTS,

vs.

THE UNITED STATES ET AL.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF OF THE ARGUMENT, AND ARGUMENT.

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Statement of the Case, Specification of Errors, Brief of the Argument, and Argument.

I.

STATEMENT OF THE CASE.

This case was instituted by the filing by the Arivaca Land and Cattle Company of its petition (rec., pp. 1–5), in which it alleged that it was the owner in fee of the Arivac or Arivaca land grant, in Pima county, Arizona, and prayed for a confirmation thereof. The petition set out the facts that said grant was instituted in 1812, and on October 10, 1812,

was sold at auction by the proper officers of the Spanish government to Don Augustin Ortiz; that the land was fully paid for at the time of sale, but that final title was not then issued; that the land was occupied by the purchaser, and after his death by his sons, Tomas and Ygnacio Ortiz, continuously up to 1833, when the sons filed a petition with the Treasurer General of the State of Sonora, stating that the land had been sold, paid for, and occupied, as above set out, and praying that proof might be taken as to these facts, and that a title be issued; and the petition further represented that all this was done, and that on July 3, 1833, a grant in fee was issued to said Tomas and Ygnacio Ortiz.

The proceedings before the Treasurer General of Sonora show (rec., pp. 20–22) that testimony of three witnesses was taken as to the landmarks and boundaries of the grant. The statement as to the first witness is as follows (p. 20):

"And having been asked to state whether said Aribac ranch had been settled and occupied by the deceased Don Augustin Ortiz and heirs since the year 1812 up to the present time, and whether the landmarks that designate its boundaries are the same that have existed and do exist today in the four cardinal points, said that from said year 1812 up to his death Don Augustin Ortiz kept said Aribac ranch settled and occupied, and that his sons Don Tomas and Don Ygnacio Ortiz had kept it in the same condition since their father's death up to date; and that concerning the landmarks that designate the four cardinal points, those that I have seen in the examination of the land are the same that have existed upon it without any variation, the one towards the north on the high-pointed hill (devisadero) that rises on this side of the Tajito mine, and borders on the Sierra de Buena Vista; the one towards the south standing on this side of the Longorena mine on a low hill next to a cañon covered with trees; the one towards the east standing up the valley from the spring on a mesquite tree that has a cross cut on it and borders on the Sierra de las Calaberas; and the one towards the west standing at the Punta de Agua on a pointed hill (devisadero) opposite the Sierra del Baboquivari."

The second witness testified that (p. 21):

"The ranch called Aribac has been settled and occupied from the year 1812 up to the present time by the deceased, Don Augustin Ortiz, and his successors, Don Tomas and Don Ygnacio Ortiz; and that the landmarks that designate the boundaries that have just been mentioned on the four cardinal points are the same and without any variation which since that time have designated the limits of their measurement."

The testimony of the third witness was the same.

The Treasurer General thereupon forwarded to the governor of the State of Sonora his report (p. 23) stating that by the proper documents:

"The interested parties show that in the year 1812 two sitios of land for raising cattle were surveyed and sold at auction to their deceased father, Don Augustin Ortiz; that since that time the land has been occupied without any interruption: that there exist today the landmarks placed at that time, and that all dues are paid to the public treasury."

The treasurer further stated that the parties had complied with article 27 of Law No. 30 of May 20, 1825 (Reynolds, p. 131), and recommended that the grant be issued. An order was made reciting that "whereas, the possessory right of the citizens Tomas and Ygnacio Ortiz has been legally proved, and the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized," and a formal title was issued so that the grantees might "freely cede and alienate said land as they may please and determine as absolute owners and proprietors thereof in fee," and this grant was "duly recorded in the proper book." It further appeared (rec., pp. 25, 26) from the books of record of the State of Sonora for the year 1833 that Tomas and Ygnacio Ortiz had paid the charges due on the issuance of the formal

title, and that the same had been recorded in the Book of Toma de Razon under the proper date.

At the trial the petitioners produced as a witness one Ygnacio Bonillas, a Spanish gentleman thoroughly educated and skilled as an engineer and surveyor, having been educated at the Boston (Massachusetts) University of Technology, and having practised his profession as a surveyor since 1883. He testified that he had made a great many surveys, both in Sonora and Arizona, of land claimed under grants from the Mexican government, and he gave in detail (rec., pp. 12–18) the particulars of his survey of this Arivaca grant. He first located the place called "Old Aribac," and also located the north center monument, which is designated as being on the top of a "devisadero" or "lookout" hill or monument. The south center monument is established on a low hill on this side (or north) of the Longorena mine. The witness testified that he "found such a hill as was described. The Longorena mine is a mine that is well known even to the present time; it is located on the trail that goes from this part of the country to Sonora, and it is well known, and it is so known to the present time; so I went to that mine and then from there I looked towards the north, and the description further says that this hill where the monument is is situated near a gulch where there is a rough growth of timber. There is only one gulch—the Marguita gulch. I looked for this monument on both sides or banks of this gulch, and I found a very large old monument on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill 'devisadero.' They are nearly in line"

The witness testified also as to the location of the monument towards the east, and as to the monument called for on the west he stated as follows (rec., p. 14):

"The title says the monument is established upon a lookout hill at the Punta de Agua. I went to the west, to the water or creek that runs there, and at the proper place I

found the monument. It is there—a very old one. It is on a very high hill, at the Punta del Agua, and all those points are known by those same names today. It is undoubtedly the west center monument. I found the pointed hill or devisadero The title says that this monument is on this hillock fronting the Sierra Babuquivari, and if you stand at the old ruins and look at the west center monument you will see that it is towards the Babuquivari mountains. The mountains form the background."

The case was argued and submitted and taken under advisement by the court and held under advisement for almost five years, when the order of submission was set aside and further evidence introduced by the United States and also by plaintiff (rec., pp. 39–69). The testimony of the government witness H. O. Flipper was aimed at showing that the grant could not be exactly or precisely located on the ground.

Three of the judges of the lower court were of the opinion (p. 70) that "there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it," and the grant was rejected on that ground, and two of the justices thought the grant had not been recorded. Mr. Justice Sluss delivered the dissenting opinion, in which he fully discussed the law and the facts, and was of opinion that the grant should be confirmed, and Mr. Justice Stone concurred in this view.

Petitioner was allowed an appeal and duly prosecuted same to this court.

SPECIFICATION OF ERROR.

The court erred in rejecting the grant, because the record shows that every requirement of law was complied with to constitute a complete and perfect title in fee, and the evidence shows that the grant can be located on the ground.

POINTS AND AUTHORITIES.

I.

The issuance of title by the State of Sonora was in compliance with section 28 of the Law of May 20, 1825.

Reynolds, pp. 129–131.

II.

The affirmative evidence and the weight of the evidence shows that this grant can be accurately located.

Testimony of Bonillas, rec., pp. 10–18.

Testimony of Flipper, rec., p. 48.

Testimony of Roskruge, rec., p. 66.

Opinion of Judge Sluss, rec., p. 77.

III.

In this case there are no measurements, and the ordinary rule that statements of quantity yield to natural objects should apply.

U. S. *vs.* Hancock, 133 U. S., 193, 196.

IV.

The entry in the Book of Toma de Razon is a recording of the grant such as complies with the provisions of the treaty.

U. S. *vs.* Osio, 23 How., 273–279.

The grant itself states that it was to be "recorded in the proper book," which was done (pp. 25, 26), and at the foot of the grant is the statement: "This title is recorded on page 15 of the proper book which exists in this Treasury General."

This also is sufficient proof of its record.

Applegate *vs.* Lexington and Carter County Mining Co., 117 U. S., 255–262.

Stebbins *vs.* Duncan, 108 U. S., 32–50.

ARGUMENT.

I.

This title was issued in strict compliance with the statutory law (Reynolds, pp. 129–131). Mr. Justice Sluss in his opinion quotes the provisions of the law under which this grant is issued, and his discussion is so full that nothing need be attempted to be added. The various provisions are set out in Reynolds, pages 129–131. On page 32 of the record herein is given a list of some of the similar grants which were instituted prior to the independence of Mexico and were confirmed and final title issued thereon by the authorities of the State of Sonora. The issuance of a formal paper title for land which had been sold and paid for is an act of natural justice, and was expressly recognized by statutory provision of Sonora, and this was done in very many cases.

II AND III.

The majority opinion herein states merely that the three judges rendering it "are of the opinion that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it. The claim is therefore rejected on that ground."

It will be noted that in this very brief dismissal of the case there is nothing to show what land the majority of the court thought was intended to be granted, and no discussion of the evidence by which it was attempted to identify the land. Some of the monuments are conceded by all the witnesses to be correct, and it would seem that an investigation of the evidence would disclose that the weight of the evidence, if not the undisputed evidence, shows that the grant can be located.

The dissenting opinion is very much fuller and carefully goes into every point in the case, and as to this opinion Associate Justice Sonte says:

"I fully concur in the foregoing opinion of Mr. Justice Sluss, both in his conclusions and the soundness of his reasoning, since, upon the undisputed facts in evidence, I can conceive no other rational and just conclusion."

What are the "undisputed facts?" When this case was tried in 1895, the government did not attempt to call in question the correctness of the survey of Ygnacio Bonillas. His testimony was not challenged in any respect, nor was any witness examined on the part of the government. Almost five years later the submission was set aside, and Mr. Henry O. Flipper, "special agent for the Department of Justice, assigned for duty to the office of the U. S. attorney for the Court of Private Land Claims," contradicts Mr. Bonillas in some respects. This Mr. Flipper testified (rec., p. 50) that he had made a report on the Calabasas grant in Arizona substantially as follows:

"I am of the opinion that the title is genuine, notwithstanding it is obscure and indefinite and defective, and I arrive at this conclusion the more readily because I know that there is about all of the titles issued by the Spanish authorities which I have examined something equally obscure, indefinite and defective."

In all the controverted cases which have come before this court Mr. Flipper has been unable to identify the calls of the grants. What was plain to all the other witnesses and to this court he could not see. In the case of Ely's Adm'r *vs.* U. S., 171 U. S., 220, this witness swore that, in his opinion, the country did not conform to the expediente at all and that the central point of the grant could not be identified, but this court said that it judged from the testimony that it was possible to locate the central point.

The testimony of this witness ought not to have the weight

of that of Mr. Bonillas, a wholly disinterested person, competent and experienced in the highest degree.

However, after all the criticisms that Mr. Flipper could make as to the survey of this grant, he testified (rec., p. 48):

"A. After going over the ground thoroughly,—and the description in the title papers is exceedingly indefinite—after going over the ground and with this description I am prepared to say that I cannot locate that grant absolutely, but approximately I think I can locate what I believe to be the north line and the east line and the west line. I think the east center monument is up the valley—farther up the valley than this spring—and the west center monument, probably, is the same one that Mr. Bonillas took. What is described in the title papers as the point of the water is a movable point. The point where the water stops running is farther up or down the creek, according to the season of the year. The south center monument is somewhere south of the Aribac creek; I do not know where. I think the north boundary line as described runs parallel to the general course of the valley, and the end lines will be perpendicular to that line."

Mr. Flipper testified (p. 49) that he was first out at this place in last November (1899), and had never been there before.

Disregarding any other testimony, it is submitted that even by this unfriendly witness the grant can be perfectly well identified. The central point, according to Mr. Flipper, is the place called Arivaca. The west center monument taken by Mr. Bonillas answers the calls of the grant. The east center monument is up the valley. The title paper says that it was on a tree that borders on the Sierra de las Calaberas, and the unquestioned testimony is that going up the valley beyond the spring for a distance of about four miles and a half "there is a small range of mountains running at right angles to the course of the valley" (see testimony of Bonillas, p. 13; of Flipper, p. 52, eleventh line from bottom), and "that there is no chain of mountains

crossing the valley till you come to them" (testimony of Bogan, p. 62, sixth line from top). The east center monument borders, as above stated, on this small range of mountains, which have been conclusively identified, and the point taken by Mr. Bonillas is within half a mile of these mountains (rec., p. 13). This gives the center, the west center, and the east center monuments. The north line, according to Mr. Flipper, can be located by him as running over the top of the "devisadero," on which is the monument known as U. S. L. monument No. 5. This north boundary line, according to this witness, runs parallel to the general course of the valley, and the end lines would be perpendicular to that line. This gives the center, the north line, and the east and west lines, and if there were no evidence as to the location of the south center monument it could easily be located, because, according to Mr. Flipper (rec., p. 50, eighth line from top), "it would be somewhere between the Aribac and the Longorena mine." If its exact location is not conceded, it should be taken on the line between the Longorena mine and Arivaca, as far to the south of Arivaca as the north center monument is to the north of that place. A line through this south center monument parallel to the north line would complete the four sides of the grant.

It thus appears that under the evidence given by the witnesses for the government this grant can be located. We submit that under the weight of the evidence the south center monument should be taken at the place where Mr. Bonillas testified it is. This south monument is described as "standing on this side (north of the Longorena mine) on a low hill next to a cañon covered with trees." The testimony of Bonillas accurately locates this monument in strict conformity with the calls of the title papers (rec., p. 13). Mr. Flipper endeavors to contradict Mr. Bonillas, but does not, in fact, cast any real doubt over the evidence. It is conceded that at the place taken by Mr.

Bonillas as the Longorena mine there is a mine now known by that name (rec., p. 49, 14th line from bottom). Mr. Flipper testifies that he did not find any person who had been there in 1833, and that "it is quite possible that this mine was simply taken up in the old name" (p. 49). This mine is south of Arivaca, thus answering the call of the expediente. Mr. Bonillas testified that "the Longorena mine is a mine that is well known, even to the present time. It is located on the trail that goes from this part of the country to Sonora" (p. 13). The title papers state that at the time they were issued there was a mine called the Longorena, which, according to the description, must necessarily have been very near to the mine now called by that name, and that the present Longorena mine is the same one as the ancient one by that name seems clear to a reasonable intent, if not absolutely certain. Mr. Flipper further testified (p. 50) that at or near the south center monument, as located by Mr. Bonillas, "there is a cañon covered with trees its whole length, and there is a low hill that is next to that cañon." This absolutely conforms to the call of the expediente, and would seem to remove any honest doubt as to the location of this south center monument. The map of Bonillas, facing page 30 of the record, shows the Longorena mine, the Fraquita wash or cañon (printed as "Marquita" on p. 13 of the record) running northwest to the Arivaca creek, and the south center monument next to this cañon, which is covered with trees its whole length. The only difference of opinion is as to the description of the immediate point where this south monument is placed. Mr. Bonillas testified that it is "on a low hillock, just exactly as described. Furthermore, this monument is nearly in line with old Aribac and the lookout hill devisadero." Mr. Flipper testifies that this monument is "on a small mesa covered with slaty rock." As the mine has been identified and the cañon covered with trees and the low hill next to the cañon, it is submitted that it is wholly imma-

terial whether Mr. Flipper describes a particular point as a *low hillock or a small mesa*. *Taking the testimony as a* whole, the only reasonable conclusion seems to be that Mr. Bonillas found and correctly located the south center monument.

As is said in the dissenting opinion (p. 77):

"Old Aribac is there; Aribac creek is there; the spring up the valley to the east is there; the Punta de Agua (meaning the point where the creek in ordinary stages sinks in the sand) is there; the cañon covered with trees on the south is there, and the range of mountains on the north is there, and there is the tract beyond the possibility of a doubt."

The majority opinion enters into no consideration of the evidence and gives no reason for the conclusion "that there is such uncertainty as to the land which was intended to be granted that it is impossible now to identify it." Three of the judges without an examination of the evidence thought it "impossible" to identify the land, but the other two, on examination of the evidence, say that the tract is there "beyond the possibility of a doubt," and we think it is entirely safe to urge that the dissenting opinion herein is the one which has some reasons for the conclusions arrived at.

As was said by this court in U. S. *vs.* Sutherland, 19 How., 363, 364, referring to surveys or descriptions of Mexican grants:

"Surveying instruments or surveyors were seldom to be obtained in distant locations. The applicant for land usually accompanied his petition with a deseño or map, showing the natural boundaries or monuments of the tract desired. These were usually rivers, creeks, rivulets, hills and mountain ranges. The distances between the mountains were often estimated at *about* so many leagues, and fractions of this unit little regarded. To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear rather as vague and uncertain boundary lines. But where lands had no value, and the unit of measurement was a league, such monuments were considered to

be sufficiently certain. * * * The United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government, and this court have no discretion to enlarge or curtail such grants to suit our sense of property or defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected."

The further question remains to be considered, Was the whole or only part of this tract granted, and if part, what part? The learned opinion of Justice Sluss (p. 74) goes into this question fully, and, again to quote the language of his associate, it would seem that one "can conceive no other rational and just conclusion than the one so clearly deduced by him." Justice Sluss says:

"Now, giving this titulo the most narrow construction possible, it plainly purports to convey a tract of two sitios at a certain place with the recital that the tract so conveyed is identified by boundaries which are evidenced by certain specified objects. By any fair construction it purports on its face to convey the whole of the tract within these boundaries. It does not say that it was the conveyance of a right to select two sitios thereafter to be identified, and located within the prescribed boundaries. It purports to be the final act of the government—the investiture of a complete title to a specified tract, with no future act to be performed."

The learned justice shows that the grant could not be one in the nature of a float, and continues as follows:

"The question is therefore presented squarely, Do not the proceedings of the survey, appraisement, sale and conveyance operate as a location of the tract sold within the meaning of the treaty?

"In my judgment the proceedings do have that effect."

After showing that the very object of the survey was to mark on the ground the tract of land to be sold, and that

the appraisement was of the tract of land surveyed, the learned justice adds:

"So I may say that the only fair construction of the transaction is that by the intent of the parties the outboundaries established by the surveyor were the boundaries of the two sitios appraised and sold, and evidenced the location of the tract sold.

"My conclusion, therefore, is that the proceedings of the survey operate as a determination that the boundaries of the two sitios are the landmarks specified in the report of the survey, and that this determination remains true and binding until set aside in a proceeding for that purpose."

The confirmation or grant in 1833 was evidently of the tract of land according to the specified boundaries thereof. The language of the title paper seems to admit of no other construction. The witnesses testified that these boundaries were the limits of the measurements of the purchaser in 1812, and that "there exist today the landmarks placed at that time (1812)," and that since 1812 "the land has been occupied without any interruption," and the decree (rec., p. 23) recites that "the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Arivac still exist and have been recognized."

All this refers to the whole of the tract, because there is absolutely no suggestion that the right to select part out of the tract was what was granted. If the parties were not entitled to the whole of the tract it is impossible to believe that their rights would not have been adjusted when they made application for title in 1833. If they were entitled to only part of the tract there was no better time than in 1833 to identify once for all what they owned, and if the Mexican government intended to reserve any part of the tract then was the time to declare so.

We think the language of this court in U. S. *vs.* Hancock, 133 U. S., 193, 196, fully applies to the present state of facts:

"It is obvious that the confirmation was of a tract with specified boundaries, and as such covered all the land within those boundaries, irrespective of quantity, and this, notwithstanding there appeared in the prior proceedings statements that the tract contained a certain amount, 'a little more or less,' which amount was very much less than that included within the boundaries."

There seems to be nothing in the language of the petition of the heirs of Ortiz or in the grant or any of the proceedings leading up to the delivery of the final title to show that any one had any idea or conception that the grantees were not to have all the land within the boundaries of the tract identified by the witnesses in 1833.

Justice Sluss points out in the present case what is true of all the grants in the territory acquired under the Gadsden purchase that they are, in the very nature of the case, not "floats," but are sales of tracts of land previously identified by a survey. To attempt to liken these grants to the floating grants made under a wholly different system in California is to attempt a manifest impossibility. The grants by quantity, or floating grants of California, were not surveyed at the time. "The right to so much land to be afterwards laid off by official authority in the territory described passed (in California) from the government to the grantee by the execution of the instrument granting it" (Fremont *vs.* U. S., 17 How., 542, 558). Grants of quantity, or floats, "usually designated the land ceded by the general name of the valley or locality where situated, with a clause annexed that the concession is limited to the specific quantity mentioned, and that the magistrate of the vicinage, of whom possession was to be solicited, should cause the same to be surveyed, and that any surplus existing should be reserved for the use of the nation."

When, in California, the quantity which passed under the grants was surveyed by the officers of the government and segregated from the public domain by the boundaries estab-

lished and the grantee put in possession, "what was previously a grant of quantity became a grant of a specific tract," and the establishment of this tract was in the nature of a judicial proceeding and had all the force and effect of a judicial determination binding upon the former government.

Graham *vs.* U. S., 4 Wall., 259.
U. S. *vs.* Pico, 5 Wall., 536.

The difference between the California and Sonora grants is that this judicial determination of the specific tract which was made after the grants in California was, in the Sonora grants, made before the sale. The proceedings of survey, measurement, appraisement, etc., in Sonora were similar to the establishment of the boundaries by the officers in California. In each case the effect was that of a judicial identification of the tract which became private property.

It will thus be seen that the Sonora grants were executed contracts of sale of the whole of a tract of land the boundaries of which had previously been established by the proper officers of the Mexican government and the value of such tract fixed by the appraisement, so that the sale was "the investiture of a complete title to a specified tract, with no future act to be performed."

This has always been common knowledge in the profession. Mr. Spaulding, in his work on public lands, has as section 511 the following:

"In the treaty of Guadalupe Hidalgo; in the Gadsden treaty; grants in Arizona and New Mexico. 2. Grants (so called) where the land, after certain preliminary proceedings, was put up at auction and sold to the highest bidder. In other words, they are executed contracts of purchase, instead of grants."

These Arizona grants have been before the Court of Private Land Claims for many years. The judges of that court have had extended opportunities for their consideration,

and the conclusions which Mr. Justice Sluss arrived at are certainly entitled to great weight. His reasoning seems conclusive in support of his view that by the survey and appraisement and sale the purchaser acquired title to and dominion over the entire tract by its boundaries against all the world.

In addition to the foregoing testimony, the witness George J. Roskruge, formerly United States Surveyor General for Arizona, and a most competent and experienced surveyor, testified that in 1881, under instructions from the Surveyor General, he had executed a preliminary survey of the Arivaca grant to the extent of two leagues, or 8,680.52 acres This survey takes in the town of Arivaca and Old Arivaca, and includes all the water on the grant.

In Ely's Adm'r *vs.* U. S., 171 U. S., 220, 241, referring to these surveys and the question of excess, this court said:

"If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity, by its commissioner or master, to determine exactly what was intended to pass under the grant."

But in the present case there are no measurements and no reason for restricting the area of the grant. The order under which the grant was issued recited, as heretofore quoted, that "the landmarks and boundaries of the two sitios that were registered and surveyed in the year 1812 at the place called Aribac still exist and have been recognized." This is an unqualified statement that the boundaries of the two sitios were the ones testified to, and the case is therefore the ordinary one where there is a difference between the estimated contents and the actual area, and the familiar rule applies that natural objects control statements

of quantity. This rule is as applicable to Mexican grants as to conveyances under the common law, and U. S. *vs.* Hancock, *supra*, is one of the many instances of the application of the rule. Where a tract is conveyed by well-defined natural objects, the evident intention being to convey the whole of such tract, it is believed that no case can be found holding that the statement of quantity controls the natural objects.

IV.

Two of the judges expressed the opinion that this grant "does not appear to have been recorded within the meaning of the treaty of 1853." That view is based on the fact that although there is a proper entry at the proper time in the Book of Toma de Razon, and although the testimonio, or original patent, which was offered in evidence and is conceded to be genuine, bears at its end the endorsement that "this title is recorded on page 15 of the proper book which exists in this Treasury General," still, because the expediente or matrix is not now to be found, there is no record.

Such view is opposed to the holdings of this court and to the practice as followed in Sonora, as shown by the many records which have been before the lower court and this court on appeal. The established and universally followed custom was that an expediente was made, containing a full record of all proceedings up to the payment of the money. There was then issued the titulo or testimonio, which contained the contents of the expediente, sometimes in a complete form, but oftener condensed in part, and contained also the "*pro tanto*," or granting, clause. Note of this title was then made in a book called the Toma de Razon, and at the bottom of the titulo was appended an endorsement that "this title is recorded on page — of the proper book." The expediente was retained in the archives, but the testimonio or titulo was delivered to the grantee as his muniment of

title, just as a United States patent is issued after the land laws of the United States have been complied with.

The treaty speaks of grants which have been "duly recorded." This means, of course, recorded according to the laws and customs of Mexico. The testimonio in the present case, as in every other, provides that the "title shall be delivered after being duly recorded in the proper book," and also recites that "this title is recorded in the proper book." It is evident, therefore, that "duly recorded" means "recorded in the proper book," which was done in this case, as is shown by the copy of the entry from the Book of Toma de Razon (rec., p. 26). This entry appears in the book of record at the proper date, and is shown in connection with the one immediately preceding and following it, so that it is impossible to claim that it was in any respect irregular. The grant was recorded in strictest compliance with the law, and the fact that the expediente has been lost or mislaid is immaterial. Considering the various revolutions in Mexico, and the way in which the archives were moved from place to place, the standing wonder is that the records have been preserved in as good condition as they now are.

The practice of recording land titles in Sonora is similar to the one which prevailed in California, regarding which this court said, in U. S. *vs.* Osio, *supra:*

"Adjudications of land titles were required by the Mexican law to be recorded. That requirement, however, was regarded as fulfilled according to the practice in the department of California, when a short entry was made in a book kept for that purpose specifying the number of the expediente, the date of the grant, a brief description of the land granted, and the name of the person to whom the grant was issued. In this case there is a certificate appearing at the bottom of the instrument to the effect that such an entry had been made," etc.

As heretofore stated, there is a certificate at the bottom of this grant to the effect that such an entry had been made,

and on turning to the book of records the entry is found in its proper place, as called for.

Justice Sluss in his dissenting opinion fully discusses this question of record, and Justice Murray in his separate dissenting opinion also shows that the grant was duly recorded, and counsel feels that it would be useless to try to add anything further on this question.

We think that this grant should be confirmed for the whole of the tract as shown by the monuments and boundaries.

Respectfully submitted.

ROCHESTER FORD,
Attorney for Appellants.